

instructed us to promulgate a rule 'pursuant to Section 303,' in the public convenience, interest and necessity, precisely so that we could balance the conflicting interests involved."

Another problem with a broad preemption rule is that conditions in various cities affected by the NPRM may be different based on weather, topographical conditions, and other factors. In Chicago, winter weather, including severe winds and below-freezing temperatures, affect structural requirements. Falling ice may be impossible to prevent and be carried far outside of the "fall zone", thus creating hazards which will need to be reviewed. In California, concerns may center on earthquakes and fault lines. In Chicago, finding an appropriate parcel which is big enough for a 2000 foot tower and which has an adequate "fall zone" to protect other properties from hazard may be more difficult than in less populated cities which are not as crowded. To preempt local regulations based on an accelerated timeframe applied on a "one size fits all" basis is to set up potential and unknown hazards without adequate time for review to determine the proper safety considerations and resolutions. The NAB has complained about building permits, yet it is that very requirement which allows for thorough safety reviews. Local municipalities must have the same opportunity to review plans for giant broadcast towers, with the same level of scrutiny, that is applied to other large structures

within their borders.

Preemption is particularly inappropriate in large municipalities. While we can imagine that in areas containing many smaller jurisdictions, each jurisdiction might reject an HDTV tower application for a site within its boundaries in the belief that a neighboring jurisdiction would eventually approve such tower, and thus effectively deprive an entire region of HDTV service. This is not a realistic risk in large market communities. If residents of Chicago or another large jurisdiction are unable to obtain HDTV because their elected officials have excluded HDTV towers, voters who have paid for useless HDTV sets will surely hold their local officials accountable. The normal process of political accountability, rather than a federal regulatory mandate, will surely bring HDTV towers to large markets within a reasonable time.

VI. Local Governments Have Important Interests Which Need to be Served in Evaluating HDTV Towers.

The Commission recognizes that it "is incumbent upon the Commission not to interfere with the legitimate affairs of local governments when they do not frustrate federal objectives." NPRM at ¶ 15. The Commission further recognizes that such local interests include not only "certain health and safety regulations" but the

"right of localities to maintain their aesthetic qualities." NPRM at ¶ 15. The Commission also states that the NAB Petition recognizes the "health and safety regulations" in its Proposed Rule. The City, however, believes that the NAB Petition in its emphasis on the "expeditious review of tower siting decisions" (NAB Petition at p. 29) has failed to deal with the full range of interests local governments have in reviewing major structures such as HDTV towers. Some of these interests are summarized below:

A. Zoning. Proper zoning serves a number of local public purposes, including the protection of the "public health, safety, morals, comfort, convenience and the general welfare of the people." Municipal Code of Chicago, Title 17, Article 2. More specifically, proper zoning procedures are designed, among other things: (1) to protect various residential, commercial and other areas within the City, (2) to provide adequate light, air, privacy and convenience of access to property, (3) to limit congestion and overcrowding of land and undue concentration of structures, (4) and to provide protection against fire, explosion and other hazards, and (5) to limit congestion of the public streets. Without proper zoning, neighboring properties are at the mercy of new developments which can block out the sky, cut off access or render a parcel useless or undesirable for its prior purpose. Aesthetic

considerations are important in zoning as well because they affect the liveability of zoned areas. Local governments have a definite interest in the promotion of proper zoning for all its citizens and to have the zoning process open to the public and subject to proper public scrutiny and notice.

As a part of zoning are the processes for variation from normal zoning. Planned unit developments and other similar processes provide extra scrutiny when extraordinary projects are launched so that public will know that major changes may happen. This opportunity for public scrutiny and input also enhances the probability that any decision on a project would be an informed decision, that the project, if approved, would be done properly and that conceptual or planning errors would be identified early. Surely the quality of decision making is enhanced by public scrutiny. Moving zoning decisions to a federal regulatory agency with limited familiarity with and accountability to local concern will detract from the quality of decision making. Local governments have an interest in such projects which is no less important than the interest in technological innovation. Most major projects in the City, and all above 600 feet in height, trigger require planned unit development analysis.

B. Building Permits. Local governments have an interest in

enforcing reasonable building codes, particularly when confronted with review of major projects. Public safety is at stake. For HDTV towers, given their anticipated height and significant load requirements, outside experts and computer calculations of structural strength may be needed. This review is critically important, particularly in light of the real risks such towers may create to the general public if improperly constructed. Similarly, local governments are generally charged with electrical review of construction projects to ensure safety on the job and for the public at large.

C. Utility Reviews. Local governments have an interest in reviewing the ground on which a tower is to be located to ensure that its deep foundations don't crack a utility line or impact on a tunnel or other facility. Often the risks are not known until the utilities are consulted. Yet not to complete this step is to ask for unexpected problems, some potentially quite serious. The City had recent experience with disasters arising from the sinking of shafts without regard to existing underground structures in the flooding of the Chicago Freight Tunnels.

D. Environmental Reviews. Local governments have an interest in ensuring that major project construction does not unleash some deleterious effect on surrounding properties and

waters. Potential underground environmental hazards and contamination of ground water must be reviewed with care. To race through this process is to risk serious consequences, including the release of contaminants and endangerment of public health.

E. Aviation Reviews. Although the FAA is charged with setting flight arrival and departure patterns, any City with an airfield must also consider the adverse affects on traffic patterns of towers over a certain height.

The foregoing issues have been dealt with by local governments as part of their traditional function. The local governments are closer to the populace than either federal agencies or ambitious developers of new technology. It is proper to allow such local governments to work out the issues attending HDTV.

VII. The Proposed NAB Rule Addressed in the NPRM Allowing Preemption in Regard to HDTV is Totally Inappropriate.

A. The Proposed NAB Rule is Overbroad In That It Covers Non-HDTV Facilities.

The NAB Proposed Rule, while under the guise of HDTV proceedings, is drafted to include all television and radio towers, regardless of intended use. As the Commission has noted, "the petitioners have not limited their preemption rule to DTV-

construction, including involuntary relocation of FM antennas now collocated on television towers." NPRM at ¶ 16. Were the NAB Proposed Rule to be adopted, local governments would be forced to deal with potential preemption, and all that it entails, not only for a limited number of HDTV towers, but the larger number serving all the broadcasters. The Commission has in the past noted that preemption should be used with caution. Given that there is nothing in federal statutes suggesting that Congress intended any such sweeping preemption and that, as the Commission points out, local regulation has not proved to be an "insuperable obstacle" to the promotion of radio and television (NPRM at ¶ 16), the City would urge the Commission to summarily reject this aspect of the NAB Petition.

B. The Time Periods For Local Review Are Much Too Short.

Certain of the time periods proposed by the NAB are surely unrealistic if there is to be any meaningful review by local governments of health, safety and aesthetic considerations. In our estimation, the proper time frame for approval of a 2000 foot tower is between six months and a year, which would be consistent with the extension of time allowances built into the schedule by the Commission in its Fifth Report.

The City would anticipate that such a review process (during

which all approvals would be pursued simultaneously) would entail at least the following:

1. City Council Approval of Zoning of a planned unit development would be required. To obtain approval of a planned unit development, an applicant must send proper written notice to all property owners within 250 feet of the subject site. The matter is then introduced to City Council and referred to the Committee on Zoning, which in turn refers the application to the Chicago Plan Commission. The Plan Commission would hold a public hearing within 67 days of receipt of the application and must notify the public through newspaper notice. After the public hearing, the matter is referred back to the Zoning Committee which will have a public hearing and, assuming approval, will forward the matter to the full City Council for a vote. Thus it takes two Council meetings to pass a zoning amendment and no amendments are effective until passed and published in the Council Journal. The process for obtaining two City Council meetings would also be delayed in the event an application were made during the summer recess of the City Council. The zoning process allows for reasonable democracy and for proper notice to neighboring landowners that a significant change in the neighborhood is contemplated.

2. The Department of Aviation would review plans for any tall structures to ensure that there is no conflict with flight traffic patterns at O'Hare Airport and Midway Airport. Given the size of any likely HDTV tower, it is likely to have far-reaching effects on the complex traffic patterns at both City airports and could impact airport operations throughout the Chicago region, including available descent procedures and minimum vectoring altitudes. Any required reorganization of flight patterns caused by a 2000 foot structure could adversely affect aircraft operations and potentially cost the user airlines millions of dollars because of increased delays. Such review would be dependent on the speed of FAA response.

3. The Building Department must review the structural plans for any tower. Lest it be assumed that industry's experts are sufficient, the City has had the recent experience where the facade of the Prudential building (approx. 100 stories) had to be completely reclad because facade panels were falling into the street and threatening injury to passers-by. Simultaneously, the City would review electrical and related aspects of the Project.

4. The City's Department of Transportation's Office of Underground Coordination ("OUC") is charged with reviewing large construction projects with deep foundations in order to protect

utility infrastructure from damage. The process involves the submission of construction documents not only to City officials, but also to member utilities for their review. Once the comments are back, conflicts are resolved by the OUC, a process that ordinarily would take at least 45 days for a substantial tower. Consequently, the NAB Petition would require the OUC to accelerate its processes with regard to relocation of a tower within 300 feet of its original location. Such acceleration may not provide sufficient time for full member utility review.

5. The City's Department of the Environment is charged with review of the subsurface conditions of any proposed site and any offsite impact to be caused by construction. Hazardous environmental conditions may be created which create problems for water sources or adjacent properties. In Chicago, a number of large undeveloped sites may contain environmental contamination and any potential site must be reviewed to determine if such conditions are present.

The Proposed NAB Rule would require the City to reach a decision in 45 days in regard to brand new towers, and within 30 days when towers are relocated within 300 feet, two or more towers are consolidated, whether or not the structure is new, or when the height is increased. Clearly the Proposed NAB Rule would require

extreme telescoping of procedures. The result would be a significant reduction in both public notice input and scrutiny and in the ability of the City to monitor and approve significant facilities in the City.

The Proposed NAB Rule, if adopted by the Commission, would have unwarranted results. Projects posing unprecedented safety and aesthetic issues would receive less than the usual deliberation. Given the fact that many other large-scale and significant projects are approved by local governments after proper consideration, it is highly questionable whether HDTV should merit such accelerated treatment. It seems to us unlikely that any federal agency in Washington, however well meaning, would be able to provide the same degree of oversight and protection for the public that local government is required to do. Were normal procedures to be followed, it is likely that difficulties in the process would be resolved between the City and the broadcasters without the necessity for protracted litigation between the federal government and the City.

C. The Use of the Commission to Arbitrate or to Provide Declaratory Relief Will Require the FCC to Become a National Zoning Board Enmeshed in Court Suits Across the Country.

The Commission has repeatedly indicated its reluctance to

become a national zoning board. The City suggests that by taking matters out of the courts, the Commission will be placed in that position. Moreover, the time frames proposed would put local governments at an extreme disadvantage since arbitrations would be completed within 15 days, start to finish. Local governments would be forced to respond to the FCC's timeliness in an expedited fashion, with little time for preparation.

D. The Foreclosure of Local Governments from Enforcing Proper FAA or FCC Standards Will Leave the Populace Without Recourse or Protection.

The City does not presume to set competing technical standards which would conflict with the items to be entirely preempted in part (b) of the Proposed NAB Rule. These matters are already covered by federal regulation. Nevertheless, the preemption proposed could also be used to prevent local governments from seeking enforcement of these rules. The City also understands that there have been substantial reductions in Commission staff in recent times. Such reductions may significantly affect the Commission's ability to enforce its own regulations. Consequently, the Commission must rely, to a large degree, on the certifications of industry in its license and construction permit applications. If injury arises because of failure to meet these standards, it will be the Commission which will need to explain why it can't

enforce its own regulations.

E. The Foreclosure of Aesthetic Considerations Leaves the Populace Unprotected From Poor Site Decisions.

The NAB Petition thought so little of the interest of local governments in aesthetics that aesthetics is not even considered in the Proposed NAB Rule as a proper basis for rejection of a site proposed for HDTV. Yet even the rules for satellite antennas take into account historic districts and other visual and auditory considerations. Presumably the population would not be troubled by a 2000 foot tower placed at random. Yet aesthetic considerations play a proper part of zoning and should not be set aside merely because the project is HDTV as opposed to a major development or a skyscraper.

VIII. Conclusion

The City applauds the Commission's desire to foster the advancement of free broadcast television as well as the Commission's interest in accelerating the return of analog spectrum for public uses, including public safety. However, the City must emphasize that such advances should not come at the expense of the sovereignty of local governments over their historic affairs or through the increase of risk or potential harm to their citizens.

The City respectfully contends that massive towers located in major metropolitan areas are not minor or minimal facilities which can be subject to minimal oversight at the local level. In balancing the federal interests and the extraordinary impact that huge towers will have on metropolitan areas, the Commission's Fifth Report provided the industry with certain administrative procedures to seek extensions of time to accommodate local approval. These should not be disturbed.

The record for Commission preemption is weak and in all likelihood a Commission decision to preempt would be challenged in court because few major jurisdictions could passively permit preemption of the magnitude proposed in the NPRM. It is also likely that Commission preemption would result in legislative initiatives to limit the scope of preemption available to the Commission. Such challenges would probably slow down the very roll-out the Commission is seeking.

The City invites the Commission and the broadcast industry to make local authorities partners in the implementation of this new technology and to allow proper local land use oversight practices a chance to work.

CITY OF CHICAGO

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Hype Definition

Waiting for HDTV?

Don't Go Dumping

Your Old Set Just Yet

Promise of Digital Television

Is Fading as Broadcasters

Complain About Costs

'No One Knows What to Do'

By KYLE POPE and MARK ROBICHAUX
Staff Reporters of THE WALL STREET JOURNAL

NEW YORK — Filmmaker Barry Rebo was certain he had found the next big thing in television.

On a trip to Japan, he saw his first high-definition TV set—with a picture that looked nearly three-dimensional and with crystal-clear sound. He figured that when consumers saw HDTV, they would toss out their old sets just as they had traded their black-and-white sets for color. Using special digital cameras, he began to create the largest collection of HDTV programs in America.

Today, more than a decade later, not a single one of Mr. Rebo's films has made it into America's living rooms as HDTV. "This thing could go on forever," says Mr. Rebo, now gray haired, sitting in a sparse office in New York's meat-packing district.

Rarely in the history of American business has there been a new technology that promised so much—and delivered so little. HDTV, it turns out, is going to take far longer, cost far more, and attract far fewer viewers than anyone has predicted. After lobbying for more than a decade to get HDTV approved by the government, broadcasters got what they wanted, but now they are backing off promises to switch their signals entirely to HDTV.

Broadcasters Backpedal

Instead of making a massive switch over to a single HDTV signal starting next year, as originally promised, networks are now talking about using just a portion of the high-capacity digital spectrum of HDTV to offer extra channels of standard TV signals that don't look much different from what is already on. The backpedaling has infuriated many in Washington who feel they were duped by the industry's lobbying effort. Some in Congress are threatening to levy fines and penalties against broadcasters that don't live up to their HDTV promises.

But industry executives say there was no duplicity — it's just that the technology guys were way ahead of the money guys. "This whole digital transition has been left to the engineers until just about six months ago," says Michael Jordan, chairman of CBS parent Westinghouse Electric Corp.

"All of a sudden we got this thing approved, and nobody has a clue what they are going to do." Even its biggest boosters concede that HDTV, once the Holy Grail of the TV industry, has left many in the dark. "The truth is that no one knows what to do," says HSN Inc. Chairman Barry Diller, who sat on a federal committee that reviewed the advanced TV technology. HSN owns Silver King Broadcasting.

Boon for Builders

Because the HDTV effort is in such flux, even Wall Street can't handicap the players or sort out who, if anyone, will make money. To meet deadlines put in place by federal regulators, local TV stations are now spending about \$16 billion to build transmission towers and equip their stations with receiving and transmitting equipment. That is a boon for a handful of equipment makers and tower builders, but there is little return in sight for the broadcasters. "We're all going to have to spend a lot of money, and it's not going to get us anywhere," says Jim Goodmon, president of Capitol Broadcasting Inc., the first company in the U.S. to deliver an HDTV signal.

HDTV pictures offer a higher-resolution, wider-screen picture similar to the ones seen in movie theaters today. The picture itself is rectangular, as opposed to square, and packs in twice as many lines of resolution as conventional TV sets. That, combined with the fact that digital signals aren't as susceptible to interference, help make the HDTV picture much clearer.

Few Sets Coming

But there are no TV sets out there actually equipped to receive such signals—and until the networks decide their plans, Sony Corp., Zenith Electronics Corp., Thomson SA's Thomson Consumer Electronics and others won't be selling the sets in mass quantities anytime soon.

What is surprising about the current quagmire is how recently HDTV seemed so imminent and how the very players who pushed hardest for HDTV are hedging their bets. HDTV had little or nothing to do with consumer demand; it was born out of a power grab by the broadcasting community in the 1980s as a way to keep valuable broadcast spectrum from being parceled out to paging companies and other data-communications concerns. Convinced that TV air space was their right, broadcasters argued that they needed the spectrum for advanced television technology, which they said would guarantee free over-the-air TV forever.

The broadcast networks enlisted the support of Congress, tapping into xenophobic fears about America's technological battle with the Japanese. HDTV quickly became embroiled in Sputnik-type hype. Just as the Russian space program of the Cold War era was the first to put a man in space, NHK, the hometown Japanese national broadcasting company, had produced the first HDTV picture. By the

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middle of the 1980s, Congress was being told that HDTV was essential to the survival of the American electronics industry. Even the Defense Department jumped in on the theory that high-quality television was crucial to success on the battlefield, as well. Egging on the whole spectacle was the consumer-electronics industry, which had fallen into a slump as sales of conventional TV sets matured.

An alliance of U.S. companies came up with a standard for HDTV that was adopted by the FCC last December. This past spring, the FCC began to give away the valuable digital real estate, on a promise from broadcasters that all of the nation's consumers would be receiving digital TV, which includes high definition, in just nine years. The broadcast industry and the FCC tentatively agreed on a schedule for the rollout of HDTV, which included a mandate that 26 TV stations in the country's biggest cities — representing about 30% of U.S. TV households — must begin broadcasting in a digital format by late 1998.

License Risk

That is the first step to making the full conversion to HDTV. By mid-1999, that initial group will expand to 40, and by 2000, to 120 TV stations. By 2006, all of the TV stations in the country must be broadcasting a digital signal or risk losing their FCC license.

But nobody believes the deadlines will be met. Local TV stations have to install new transmitters, new digital production facilities and new towers at a cost of between \$8 million and \$10 million each. That is about \$16 billion nationwide, estimates the National Association of Broadcasters. The networks, meantime, face the additional costs of new digital production equipment, transmitters, even cameras and new sets.

At General Electric Co.'s NBC alone, the cost of conversion has already exceeded \$50 million. News Corp.'s Fox Broadcasting estimates that it will have to pay \$100 million to fully convert its 22 owned-and-operated stations. "We're talking a decade before anything is real," says Larry Jacobson, an executive vice president at Fox Broadcasting, who is leading an internal group studying digital TV.

Persuaded by those arguments, the FCC has accepted for now the notion of allowing the broadcasters to offer a hybrid of HDTV and conventional TV. Using the same technology needed to show HDTV, broadcasters can break up the signal into several different digital channels, but they wouldn't be high definition. Both Walt

Promise of Digital Television Is Fading

Disney Co.'s ABC Television and Sinclair Broadcast Group Inc., one of the largest TV-station groups in the country, say they are exploring that option, and Fox and CBS may follow suit.

PBS Model

The Public Broadcasting System may be a model; it is considering a compromise plan to create channels as well as broadcasting two to three hours a day of HDTV.

The networks see the chance to offer new channels on the digital spectrum as a way to compete with the plethora of cable channels chipping away at their broadcast audience. Of course, the networks still haven't figured out where they will find all the programming to fill the new channels. And the new channels probably won't be seen by most people. For viewers to see them, they will have to buy a yet-to-be-designed "converter" box that translates that signal so it can be seen on existing analog TV sets. The cable industry, meantime, is already rolling out its own version of a set-top box to vastly expand the number of channels for cable subscribers.

But critics say that forgoing a single HDTV signal in favor of squeezing more channel space out of the spectrum is breaking promises broadcasters made to win control of broadcast rights valued at tens of billions of dollars. Rep. Billy Tauzin, a Louisiana Republican and chairman of the House Telecommunications subcommittee, said in an interview that if broadcasters balk on HDTV, they could face hefty fees or severe public-service requirements. "I can guarantee ABC and every one of the broadcasters that there will undoubtedly be a debate," if they scale back on their HDTV plans, says Rep. Tauzin. "I would bank on that fact."

Gigi Sohn, an attorney for the Media Access Project, a digital-TV watchdog group, blames the networks for the HDTV mess. "I think the broadcast industry has pulled one over on Congress and the American public," she says.

Tower Trouble

Broadcasters deny that is the case. Besides the huge costs, they note, there are logistical hurdles that no one anticipated. Among them: a shortage of crews trained to build the towers that hold the digital transmitters. "There's no way we can build this infrastructure in the time frame they've set," says Ronald L. Gibbs, president of Lodestar Towers Inc., a tower builder in Tequesta, Fla. "These things just aren't stamped out in mass production." And in many communities, the construction of new towers for digital television has attracted fierce opposition.

Meanwhile, broadcasters' hesitation has led to a chicken-and-egg standoff with the makers of HDTV sets. The broadcasters don't want to commit to broadcasting their signal in HDTV because no one owns an HDTV set and demand is uncertain. Manufacturers say they are waiting on the networks. Set makers concede that while they hope to have the first HDTV sets by next year, generating consumer interest will be impossible if there is no programming in HDTV from the networks.

Concerned that the broadcasters are punting on HDTV, some manufacturers are considering providing the programming themselves. Japan's Matsushita Electric Industrial Co., which makes Panasonic TV sets, is in talks with Hollywood about co-producing HDTV shows. "Programming will be the key driver" of HDTV sales, said Peter Fannon, Matsushita's government-affairs director, at an HDTV conference in New York yesterday sponsored by UBS Securities Inc.

Lukewarm Consumers

Surveys about how consumers will react are mixed. A poll commissioned by Harris Corp., a maker of digital-TV equipment, said that 39% of the people surveyed said they would buy new TV sets as soon as they were available, and 47% said they would make the purchase in one to two years. In another survey this summer of 1,000 consumers by Price Waterhouse, TV buyers said they would be willing to spend only about \$150 more for an HDTV set than for a conventional one.

Clearly, consumers appear indisposed to spend anything close to the \$3,000 to \$5,000 price that early HDTV sets will command. The initial steep price of HDTV means that fewer than 40% of the households in America will own HDTV sets by 2006, according to the Electronic Industries Association. That fact recently helped prompt federal regulators to back off of an earlier deadline that gave local TV stations until 2006 to retrofit their equipment to allow HDTV.

In the long term, TV-set makers stand to gain from a conversion to HDTV. For most of the past decade, the TV-set business has been a dud, dominated by a mature, sated market — 98% of U.S. homes have at least one TV set already — and poor margins. There are about 250 million TV sets, or about 2.5 sets per household, UBS says in a report, and one out of four families buys a TV set every year.

Scary Time

But some TV manufacturers say consumers aren't buying new sets now, waiting instead for new digital sets. In hopes of keeping its high-margin business from

collapsing, Zenith Electronics, a Glenview, Ill., TV-set maker, last month took the unusual step of promising to refund the cost of its large-screen TV sets for customers who want to buy a new HDTV. "There are too many unanswered questions at this point," said Phillip J. Schoonover, senior vice president of TV retailer Best Buy Co. "This can be a scary and expensive time."

In the end, the TV-set makers and retailers could make out the best if, after a decade, consumers like what they see coming from digital-television signals and begin a wholesale switch to HDTV sets, much like the switch to color TV after the 1950s. And prices of consumer-electronics products typically drop when there is a mass market.

But echoing the views of nearly everybody involved in HDTV, Westinghouse's Mr. Jordan says, "None of this is going to happen from a business standpoint for at least three years. Right now, this is a tempest in a teapot."